UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 591

Case No. 653: UDOVIK

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Ioan Voicu, Mr. Mikuin Leliel Balanda;

Whereas at the request of Larissa Udovik, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 August, 22 October 1991, 31 March and 30 April 1992, the time-limit for the filing of an application to the Tribunal;

Whereas, on 30 April 1992, the Applicant filed an application requesting the Tribunal:

"...

(a) to endorse the unanimous recommendation of the Joint Appeals Board that the Applicant 'be granted a personal upgrade from G-4 to G-6 retroactive to 1 January 1985 and that her salary and allowances from 1 January 1985, until her separation and her termination indemnity afterwards be adjusted accordingly' (...), and

(b) to grant Applicant such other relief, including interest, as the Administrative Tribunal may deem just and appropriate."

Whereas the Respondent filed his answer on 15 September 1992;

Whereas the Applicant filed written observations on 16 October 1992;

Whereas, on 4 June 1993, the Tribunal put questions to the Respondent, who, on 8 and 11 June 1993, provided his answers thereto;

Whereas, on 16 June 1993, the Applicant provided her comments thereon;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 8 November 1967, as an English Clerk in the Department of Economic and Social Affairs. She was offered a three-month fixed-term appointment at the G-2 level, converted to a probationary appointment with effect from 8 February 1968 and to a permanent appointment, with effect from 1 November 1969. On 22 March 1972, the Applicant's appointment was terminated for unsatisfactory service. Upon the Applicant's request for administrative review of this decision, the Secretary-General rescinded the termination, on the recommendation of the Appointment and Promotion Panel (APP). The Applicant was reinstated, with retroactive effect, from 22 March 1972.

On 1 May 1973, the Applicant was reassigned to the Internal Audit Service, Department of Administration and Management. Her functional title was changed to Audit Clerk, with effect from 1 October 1974. She was promoted to the G-4 level, with effect from 1 April 1976, as Senior Audit Clerk.

After the introduction of the new seven-grade classification of posts in the General Service and related categories in New York, in December 1985, the Applicant's post was reclassified to the G-7 level.

On 19 May 1986, the Deputy Director, Division for Policy Co-ordination, Office of Personnel Services, informed executive and administrative officers of all departments, that, while implementation of the results of the classification of posts "should not normally depend on satisfactory service", in cases "where action has been taken to withhold a salary increment, to initiate termination procedures because of unsatisfactory services

or where there is on file a reference in writing to unsatisfactory performance prior to implementation date, the Chief, Staff Services, should be consulted".

On the same date, the Executive Officer for the Department of Administration and Management wrote to the Office of Personnel Services, recommending the termination of the Applicant's permanent appointment for unsatisfactory services.

On 5 June 1987, the Assistant Secretary-General for Human Resources Management[1] (OHRM) advised executive and administrative officers that "implementation of the reclassification results should only be withheld if implementation would be totally inconsistent with other action being taken with respect to the staff member's performance and after consultation with the staff service".

On 24 March 1987, the Executive Officer, Department of Administration and Management, informed the Applicant as follows: "in view of the action initiated by the Department for termination for unsatisfactory service, implementation of the classification exercise in your case is pending."

In a letter dated 27 September 1989, the Assistant Secretary-General, OHRM, informed the Applicant that the Secretary-General had decided to accept the APP's recommendation to terminate her appointment for unsatisfactory service. The administrative procedures regarding the Applicant's termination were completed in 1989.

An appeal lodged by the Applicant against the decision to terminate her appointment was considered by the Joint Appeals Board (JAB) which adopted its report on 7 January 1991. Its conclusions and recommendations read as follows:

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[1] Successor of the Office of Personnel Services.

"55. The Panel concludes that

- the decision to terminate the appellant's permanent employment for unsatisfactory service was not improperly taken,

- the decision to withhold the implementation of the reclassification of the appellant's post was not in accordance with the relevant guidelines;

- the appellant did not succeed in carrying the burden of proof necessary to establish that any of the contested decisions were due to prejudice.

56. Accordingly, with regard to the withholding of the implementation of the reclassification, the Panel recommends that the appellant be granted a personal upgrade from G-4 to G-6 retroactive to 1 January 1985 and that her salary and allowances from 1 January 1985, until her separation and her termination indemnity afterwards be adjusted accordingly.

57. The Panel makes no further recommendation in support of the appeal."

On 14 February 1991, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed her that the Secretary-General had re-examined her case in the light of the report, and had "decided, in accordance with the Board's recommendation, to maintain the decision to terminate your permanent appointment for unsatisfactory service." He added:

"At the same time, he has decided not to accept the Board's recommendation that you be upgraded from G-4 to G-6 retroactive to 1 January 1985 and that your salary and allowances from 1 January 1985 until the date of your separation as well as your termination indemnity be adjusted accordingly. The Secretary-General's decision is based on the following considerations:

(a) that the results of the initial classification of posts in the General Service and related categories in New York were not implemented in December 1985, as had been first intended, but in 1987, following the necessary approval by the General Assembly in its

> resolution 41/209 of 11 December 1986 of the Secretary-General's proposals on the matter. Thus following the issuance of ST/IC/86/27/Add.3 of 27 January 1987, which informed the staff of the action being taken to implement the results of the exercise as approved by the Assembly, you were advised by memorandum of 24 March 1987, from the Executive Officer, Office of Financial Services, that in your case implementation was pending in view of the action which had been initiated for termination of your appointment. Accordingly, implementation of the results of the classification exercise, albeit retroactive to 1 January 1985, took place after action had been initiated on 19 May 1986, for the termination of your appointment.
>
> (b) that, in any case, you could not have been retroactively upgraded because this would have been contrary to Article 101, paragraph 3, of the Charter and staff regulation 4.2 which establish as the paramount consideration in promotion the necessity of securing the highest standards of efficiency, competence and integrity."

After her separation from service on 29 September 1989, the Applicant had applied for a disability benefit from the United Nations Joint Staff Pension Fund.

In a letter dated 25 November 1991, the Secretary of the UN Joint Staff Pension Fund informed the Applicant that the UN Pension Committee had granted her a disability benefit pursuant to article 33 of the Pension Fund Regulations. In a letter dated 23 December 1991, the Assistant Secretary-General, OHRM, informed the Applicant as follows:

> "As you are aware, the United Nations Joint Staff Pension Committee has decided to award you a disability benefit on account of your incapacity for further service in accordance with the provisions of article 33 of the Regulations of the Pension Fund. On being advised that the Staff Pension Committee has agreed to award you the said benefit, the Secretary-General has decided to authorize the termination of your permanent appointment under staff regulation 9.1(a). This termination precedes your termination for unsatisfactory services effective 29 September

1989, which must be retroactively cancelled, since by implication, your services were unsatisfactory because of your medical condition.

Your new termination for reasons of health under staff regulation 9.1(a) and the termination indemnities you received will be adjusted in accordance with the provisions of Annex III (b) to the Staff Regulations since you received six months of termination indemnities under Annex III (c) and three months' compensation in lieu of notice when you were terminated for unsatisfactory services in September 1989.

The Secretary of the UN Joint Staff Pension Board will advise you of the commencement of payment of your disability benefit and my office will take all the necessary steps to process your separation with maximum dispatch. This letter constitutes formal notice of termination as required by staff rule 109.3(a). The effective date of the termination of your appointment will be 14 October 1990.".

On 30 April 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision not to pay the Applicant the difference in salary in accordance with the new classification of her post was invalid because it was not in accordance with the established guidelines.

2. Any justification to withhold the difference in pay disappeared as a result of the subsequent retroactive cancellation of the decision to separate her for unsatisfactory services and its replacement by a termination for reasons of health.

Whereas the Respondent's principal contention is:

The decision not to promote Applicant accorded with the requirement in the Staff Regulations that the paramount consideration for promotion is performance. Secretariat memoranda to Departmental Executive and Administrative Officers must be read consistently with the Staff Regulations.

The Tribunal, having deliberated from 3 June to 25 June 1993, now pronounces the following judgement:

I. The main issue in this case is whether the Applicant's rights were violated by the Administration's decision to withhold the implementation of the reclassification of the Applicant's post from the G-4 to the G-6 level because of the action it had initiated to terminate the Applicant for unsatisfactory service. The reclassification resulted from the introduction of a seven grade structure for the General Service and Related Categories in New York.

II. Reclassification of the Applicant's post from the G-4 to the G-7 level was to be implemented retroactively to 1 January 1985, when authorized by the General Assembly. However, pursuant to information circular ST/IC/86/27/Add.3 of 27 January 1987, the initial upgrading of the Applicant's post would have been by two levels, to G-6 and then, a year later, to G-7, subject to a review of her performance by the relevant Career Development Committee. The implementation of the upgrading was originally scheduled to take place in December 1985, but, as a result of General Assembly resolution 41/209 of 11 December 1986, it was postponed until 1987.

III. The Tribunal notes that, because the Applicant's performance had been deemed unsatisfactory for a variety of reasons, a recommendation was made, on 19 May 1986, to the Office of Personnel Services (OPS) by her Department to terminate her permanent appointment. Also, on 19 May 1986, internal advice was furnished by OPS to executive and administrative offices that, while implementation of the results of the classification of posts should not normally depend on satisfactory service, if action had been taken to initiate termination procedures because of unsatisfactory service, the Chief, Staff Services, should be consulted before implementing the reclassification.

IV. The Tribunal further notes that, on 5 June 1987, the Assistant Secretary-General for Human Resources Management, advised executive and administrative offices that implementation of the reclassification (which had been approved by the General Assembly to take effect in 1987) should only be withheld if it would be totally inconsistent with other action being taken with respect to the staff member's performance and after consultation with staff services. The point was repeatedly made that reclassification was a technical exercise, not a promotional exercise, and that except in extraordinary cases, it should be dealt with as such.

V. The Tribunal requested, on 4 June 1993, additional information from the Respondent. In his reply dated 9 June 1993, the Respondent asserted that the internal guidelines regarding implementation of reclassification decisions circulated to executive and administrative offices in May 1986 and in June 1987, provided for possible withholding of the reclassification of posts due to unsatisfactory service by their incumbents. The Respondent maintained that, according to the evidence, the Applicant's services were unsatisfactory, and had been so for a considerable period of time.

VI. In view of the absence from the file of an indication of consultation with Staff Services either in 1986 or 1987, by the executive or administrative officers of the Applicant's department regarding implementation of the reclassification of her post, the Tribunal requested additional information from the Respondent as to whether such consultation occurred.

The Tribunal notes from the Respondent's answer dated 11 June 1993,that at the time when the initial classification exercise was implemented, consultations were held by the then Executive Officer with the Personnel Officer and the Chief of Staff Services. They agreed that any decision to promote the Applicant based on the classification of the post would be contradictory to the ongoing discussions of the Applicant's performance which was

unsatisfactory. A comment on the decision not to change the grade was included in the Personnel Action form dated 16 March 1987, reflecting change to the new classification system and renumbering of the staff member's post.

VII. The Tribunal was also informed that no reclassification resulting from the reclassification exercise was implemented prior to 1987. In addition, the Respondent stated that the results of the initial classification exercise were implemented only in 1987, following the General Assembly's approval of the results in section IX of its resolution 41/209 of 11 December 1986. However, as the effective date for the implementation of the results of the initial classification exercise was 1 January 1985, staff members whose posts were classified at levels above their personal grade, were placed at the classified level of their posts with retroactive effect to 1 January 1985, provided they met the conditions specified in the implementation procedures set forth in annex 1 of information circular ST/IC//86/27.

VIII. The Tribunal observes that considerable delay occurred between the recommendation in 1986, to terminate the Applicant's appointment and the actual termination. In part, this was due to the Applicant's unwillingness to nominate two staff members to the Joint Review Group that was to consider and make a recommendation regarding her termination. Further delay was caused by her arguments on whether a special report called for by the applicable procedural regulations had been prepared. Eventually, the Joint Review Group submitted its report, finding that the Applicant had shown total disregard for UN working hours, performed unsatisfactorily, and had engaged in unprofessional conduct. It recommended that her appointment be terminated. The termination became effective on 29 September 1989.

IX. The Tribunal notes that, before the JAB, the Applicant challenged both her termination and the failure to reclassify her

post. The JAB found no fault with the termination but considered that the failure to reclassify her post "was not in accordance with the relevant guidelines". The JAB felt that, because the original indication in December 1985, of non-implementation of the reclassification occurred before the termination recommendation in May 1986, it was not in accord with the internal advice that action regarding non-implementation of reclassifications should be taken only after a termination recommendation. The JAB recommended that the Applicant's reclassification to the G-6 level be made effective as of 1 January 1985. The Respondent declined to accept this recommendation on the ground that the JAB had overlooked the fact that, due to General Assembly action, implementation of the entire reclassification exercise had been deferred until 1987 and that, since the recommendation for the Applicant's termination was made in May 1986, the internal advice had been followed. The Tribunal also notes that the basis for the termination of the Applicant's appointment was in existence, long before implementation of the reclassification.

X. The Tribunal finds that, with respect to the invocation of considerations relating to promotion and performance, there seems to be some ambivalence on the part of the Administration. On the one hand, reclassification is described as a technical exercise unrelated to performance (cf. Judgement No. 388, Moser (1987), paras. V and VIII) and, on the other hand, performance-related considerations enter into the picture regarding the one-year period following a raise by two grades before a raise by an additional grade may be made effective. They also enter into the picture in connection with termination recommendations, step increases, etc. It may be desirable for the Administration to consider clarification of this matter by an appropriate staff rule or administrative instruction. (Cf. Judgement No. 506, Bhandari (1991), para. VII.)

XI. The Tribunal is faced with exceptional circumstances in the present case, i.e. action on the part of the Respondent, dated 23 December 1991, retroactively cancelling the Applicant's previous termination for unsatisfactory service.

In the Respondent's view, the retroactive cancellation of the initial termination, with effect from 29 September 1989, by the decision of 23 December 1991, changing the basis for the Applicant's termination, implied no retroactive reassessment of the quality of her unsatisfactory services. The Tribunal notes that the essence of the decision of 23 December 1991, communicated to the Applicant in a letter signed by the Assistant Secretary-General, OHRM, was that the United Nations Joint Staff Pension Committee had decided to award the Applicant a disability benefit, on account of her incapacity for further service in accordance with the provisions of article 33 of the Regulations of the Pension Fund. The letter further stated that in the light of that award, the Secretary-General had decided to authorize the termination of her permanent appointment under staff regulation 9.1(a).

XII. The Tribunal notes that the decision of 23 December 1991, was based on a finding by the UN Staff Pension Committee under article 33(a) of the Pension Fund Regulations. Rule 4.1 of the Administrative Rules of the United Nations Joint Staff Pension Fund delegates to the Staff Pension Committee of a Member Organization the responsibility to consider applications for disability benefits. The Tribunal observes that article 33(a) of the Pension Fund Regulations provides that: "A disability benefit shall, subject to article 41, be payable to a participant who is found by the Board to be incapacitated for further service in a member organization reasonably compatible with his abilities...".

XIII. The Tribunal considers that, in the present context, the decision taken on the basis of the above-mentioned article cannot be regarded as transforming the nature of the Applicant's service. In the view of the Tribunal, the decision of 23 December 1991, was

a decision of derivative nature, pursuant to the finding of the UN Staff Pension Committee, that the Applicant was incapacitated for further service. The Tribunal also cannot ignore the fact that the record establishes extreme dissatisfaction by the Administration with the Applicant's performance and conduct since 1982.

XIV. The Tribunal concludes that the decision of 23 December 1991, is not inconsistent with the decision to refuse to implement retroactively reclassification of the Applicant from the G-4 to the G-6 level, and that, in the circumstances of this case, the latter decision was within the Respondent's authority.

XV. In the light of the foregoing, the Tribunal finds that the Applicant is not entitled to the retroactive reclassification of her post from the G-4 to the G-6 level and, therefore, the application is rejected.

(Signatures)

Jerome ACKERMAN
President

Ioan VOICU
Member

Mikuin Leliel BALANDA
Member

Geneva, 25 June 1993

R. Maria VICIEN-MILBURN
Executive Secretary